

The claimant appeared by and through his attorney, Lawrence M. Gurney, of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, James M. McVay, of Great Bend, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board for purposes of this review is the same as that listed in the Award of the Administrative Law Judge dated November 23, 1993.

STIPULATIONS

For purposes of this appeal the Appeals Board adopts those stipulations listed in the Award of the Administrative Law Judge dated November 23, 1993.

ISSUES

The only issue presented by oral argument for decision by the Appeals Board was the nature and extent of claimant's disability. The amount of claimant's average weekly wage, entitlement to unauthorized medical expense, entitlement to future medical expense and entitlement to vocational rehabilitation benefits were also presented to and decided by the Administrative Law Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) As a result of his accidental injury arising out of and in the course of his employment on February 11, 1992, the claimant suffered a 25 percent (25%) permanent partial general disability.

Claimant, a maintenance worker for Dodge City Community College, injured his neck and low back while attempting to move a big-screen television. He was treated by Dr. Kyi and referred to Dr. Shapiro, a neurosurgeon. Claimant underwent a period of physical therapy. While receiving temporary total disability compensation he was informed that his position with respondent had been terminated for budgetary reasons. Following his release from his physician's care claimant worked part-time as a delivery person for Pizza Hut.

Both Dr. Shapiro and Dr. Schlachter testified. Dr. Shapiro did not, however, give a rating of claimant's disability. He indicated he did not have an opinion as to whether claimant was entitled to a rating for functional impairment. Dr. Shapiro said he would not rate the claimant unless he had performed a functional capacity assessment.

The only rating introduced into evidence was that of Dr. Schlachter. It was his opinion that claimant suffered an eight percent (8%) permanent partial loss of function to the body as a whole. He also recommended restrictions prohibiting claimant from lifting more than 50 pounds on a single lift and 40 pounds repetitively. He recommended no repetitive bending, twisting, or working in awkward positions. It is his opinion that if the claimant worked outside those restrictions he would find himself off work and in need of medical treatment. He indicated generally he felt claimant could work in the lower end of the heavy work category. Although Dr. Shapiro has, in his testimony, expressed some general opinion about claimant's condition, the Appeals Board agrees generally with the observation in the decision by the Administrative Law Judge indicating that Dr. Schlachter is in effect the only physician giving opinion as to functional impairment and restrictions.

Two vocational experts, Mr. Longacre and Mr. Hardin, also testified. From the restrictions of Dr. Schlachter, Mr. Longacre indicated claimant would have a 33 percent (33%) loss of access to the open labor market but a zero percent (0%) wage loss. He testified the claimant, earning \$250.00 at the time of the accident, has the ability to earn

\$250.00 per week post-accident. Mr. Hardin testified that, on the other hand, claimant suffered a 45 percent (45%) loss of access to the open labor market and a 23 percent (23%) wage loss. For the wage loss he compared \$260 pre-accident wage with \$200 per week post-accident wage. The Administrative Law Judge has, as required by Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), and Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991), weighed both loss of access to the open labor market and wage loss in reaching his decision regarding the nature and extent of claimant's disability. The Administrative Law Judge, has in fact, averaged those two factors for each vocational expert and then averaged the two vocational experts to arrive at the 25 percent (25%) permanent partial disability award. The Appeals Board agrees with this finding.

Respondent has argued that claimant should not be awarded a work disability in this case because claimant did not answer the notices of job openings which respondent sent to claimant's attorney. Respondent further argues claimant should be denied work disability and limited to functional only because claimant did not cooperate with physical therapy. The Appeals Board finds that the facts and circumstances of this case do not support respondent's contentions in this regard and do not justify denial of a work disability award. The evidence generally shows the claimant's attorney was sent four or five notices of openings. Two of these were sent during the time claimant had not been released to return to work. Two others had job duties similar to those which claimant performed at the time of his injury. He has indicated he does not feel he could perform those duties within the restrictions imposed. Respondent's personnel officer testified no offers were in fact made. She had no opinion regarding whether claimant could perform those duties of those jobs within the restrictions recommended.

The record also does not support the contention that claimant refused to cooperate with physical therapy. There is evidence indicating he asked to be relieved of time on the stationary bicycle. There is also indication that the physical therapist felt he needed closer supervision and additional motivation. It appears that Dr. Shapiro's testimony is the origin of the argument made by respondent. Dr. Shapiro testified he had understood claimant was not cooperating with the physical therapist. In fact, however, Dr. Shapiro testifies he does not recall his conversation with the physical therapist. The physical therapist's testimony, on the other hand, generally indicates claimant did benefit from his work with physical therapy but that the physical therapist would like to have seen more benefits. This does not rise to the level of refusal to cooperate or participate in the physical therapy.

Under all the facts and circumstances, the Appeals Board affirms the Administrative Law Judge's decision and finds and awards benefits based upon a 25 percent (25%) permanent partial general disability.

- (2) The claimant's average weekly wage was \$309.16.
- (3) The claimant is entitled to an amount not to exceed \$350.00 as unauthorized medical expense for the examination and evaluation by Dr. Schlachter.
- (4) The claimant is entitled to future medical treatment only upon proper application to and approval by the Director of Workers Compensation.
- (5) Claimant is entitled to vocational rehabilitation benefits only upon proper application to and approval by the Director of Workers Compensation.

AWARD

WHEREFORE, the decision by the Administrative Law Judge is hereby affirmed and an award of compensation is entered in accordance with the above findings in favor of the claimant, Dion L. Esquibel, and against respondent, Dodge City Community College, and its insurance carrier, Employers Mutual Companies, for accidental injury occurring on February 11, 1992.

The claimant is entitled to 38 weeks temporary total disability at the rate of \$206.12 per week or \$7,832.56 followed by 377 weeks at \$51.53 per week or \$19,426.81 for a 25 percent (25%) permanent partial general disability, making a total award of \$27,259.37. As of February 22, 1994, there would be due and owing to the claimant 38 weeks of temporary total disability compensation at \$206.12 per week in the sum of \$7,832.56 plus 68 weeks permanent partial compensation at \$51.53 in the sum of \$3,504.04 for a total due and owing of \$11,336.60, which is ordered to be paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$15,922.77 shall be paid at \$51.53 per week for 309 weeks or until further order of the Director.

Claimant is awarded an amount not to exceed \$350.00 as unauthorized medical expenses.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and the Fund to be paid direct as follows:

TRI-STATE REPORTING SERVICE	
Transcript of Regular Hearing	\$ 174.00
TODD REPORTING	
Deposition of Dr. Schlachter	\$ 99.05
IRELAND REPORTING	
Deposition of Mr. Hardin	\$ 195.00
TRI-STATE REPORTING SERVICE	
Deposition of Mr. Schremmer	\$ 255.15
TRI-STATE REPORTING SERVICE	
Deposition of Ms. Scheuerman	\$ 170.75
OWENS, BRAKE & ASSOCIATES	
Deposition of Mr. Longacre	\$ 193.19
KELLY, YORK & ASSOCIATES	
Deposition of Dr. Shapiro	\$ 157.50

IT IS SO ORDERED.

Dated this _____ day of February, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Lawrence M. Gurney, 1861 North Rock Road, Suite 320, Wichita, Kansas 67206
James M. McVay, P.O. Drawer 1110, Great Bend, Kansas 67530
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director